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IN THE SUPREME COURT
OF THE
STATE OF UTAH

H. E. ANDERSON, also
known as E. H. ANDERSON,

Plaintiff and
Respondent

vs.

CASE NO. 7693

ELVIRA MAGDALINE ANDERSON,

Defendant and
Appellant

BRIEF OF APPELLANT

FILED

JUL 18 1951

Merrill C. Faux

Attorney for Appellant

Clerk, Supreme Court, Utah

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"---the court does not find and cannot presume from the statements of fact and pleadings that Stanley C. Fossell was deceased on July 14, 1926."

2. The trial court erred in reaching the legal conclusions:

"---the purported marriage between plaintiff and defendant at Grand Junction, Colorado, on July 14, 1926, was null and void ab initio;---the defendant had a husband, Stanley C. Fossell, at said time;---the relation of husband and wife never at any time existed between plaintiff and defendant.

"---the decree of divorce and award of alimony in said case \$82,262 in this court should be

modified and made a decree of annulment, without alimony, the provision for the support of the minor child of plaintiff and defendant to stand;— there was no proper or any basis for the award of alimony therein."

"—the action of plaintiff for judgment be granted."

3. The trial court erred in its order and decree:

"IT IS ORDERED, ADJUDGED AND DECREED: that the decree of divorce and award of alimony in favor of defendant herein in case #82,242 in this court on February 18, 1948 and hereby is vacated and modified, and that in lieu thereof the purported marriage between plaintiff and defendant at Grand Junction, Colorado, on July 14, 1926, be and is annulled and the award of alimony in said decree set aside,—"

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Appellant

BRIMF OF APPELLANT

STATEMENT OF THE FACTS

The respondent here as plaintiff commenced this action by filing a complaint in the District Court for Salt Lake County, it being civil case #89,084 (tr. 1-4). In the complaint he alleged:

(1) That he was the plaintiff and Elvira Magdalene Anderson was the defendant in an earlier case, #82,262, in said District Court, in which case

the defendant, on February 18, 1948, was awarded a divorce and alimony in the sum of \$50.00 per month on her counterclaim or cross-complaint.

(2) That at the time said plaintiff commenced said last mentioned action and at the time said defendant filed her said counterclaim, and at the time of the entry of the decree of divorce in said action, both parties believed they were husband and wife and that plaintiff continued to believe that said relation had existed until shortly before the commencement of this second action, civil #89,084, when he was informed and advised that the relation of husband and wife never had existed between said parties.

(3) That said District Court had found in the earlier action, civil #82,262, that said plaintiff and said defendant had inter-married at Grand Junction, Colorado on July 14, 1926.

Said plaintiff then alleged that said parties

did go through a ceremony at said time and place, but that at that time defendant had a husband, viz., Stanley C. Fossell, from whom she had obtained an interlocutory decree of divorce in the District Court of Carbon County, Utah, in civil case #2754, by decree dated May 15, 1926 but not filed until May 27, 1926; that in said Carbon County action defendant and appellant here appeared as Elvira M. Fossell, plaintiff. Plaintiff in this second Salt Lake County action attached to his complaint, a copy of the decree in the Carbon County action, case #2754, and then alleged that what purported to be a marriage between plaintiff and defendant at Grand Junction, Colorado was null and void from the beginning and of no force and effect, and that this plaintiff H. E. Anderson and Elvira Magdaline Fossell, also known as Elvira Magdaline Anderson, never were husband and wife by reason of which there was no proper or any basis for the award of alimony in action

#82,262, the first Salt Lake County action.

(4) Said plaintiff H. E. Anderson further alleged that Elvira Magdaline Fossell also known as Elvira Magdaline Anderson, the defendant, were never at any time or place parties to any marriage ceremony other than the one at Grand Junction, Colorado on July 14, 1926.

(5) Plaintiff then alleged that he did not seek to modify or vacate that part of the decree of February 18, 1948 in the first Salt Lake County action, whereby defendant Elvira Magdaline Anderson was awarded the custody of the minor child of the parties and the sum of \$50.00 per month for its support.

(6) Plaintiff H. E. Anderson also alleged that defendant Elvira Magdaline Anderson had refused since about the year 1936 to live with plaintiff in the capacity and relationship of husband and wife, as they thought themselves to be, and did not contribute to the usual companionship of husband

and wife; that notwithstanding that attitude on the part of the defendant since the year 1936; he had worked and provided for her until she obtained said decree of divorce and since such decree had regularly paid the alimony therein decreed.

(7) Plaintiff further alleged and set out the things he had done to provide for defendant in the way of making her comfortable in a home that he had purchased at Centerfield, Utah.

(8) Plaintiff also alleged that defendant had been awarded said property with its equipment, furnishings and supplies by the decree in the first Salt Lake County case #82,262, and that she had vacated said house and neglected it and had thereafter sold the house and land for \$2100.00.

(9) Plaintiff alleged that since the entry of the decree in the first Salt Lake County case, he

had paid defendant in excess of \$2600.00 as alimony thereunder.

(10) Plaintiff also alleged that he did not own any real estate and that his only assets consisted of personal property, which he listed, of minor value.

Following these allegations, plaintiff prayed that the court exercise its equitable powers and vacate and set aside that portion of the decree in the first Salt Lake County case #82,262, whereby and under which the defendant Elvira Magdaline Anderson had been awarded alimony in the sum of \$50.00 per month.

To this complaint defendant Elvira Magdaline Anderson answered (tr. 7-8) and admitted her participation in the earlier case in the District Court of Salt Lake County and that she had been awarded a divorce and the sum of \$50.00 per month alimony; that

she and plaintiff H. E. Anderson were never parties to any marriage ceremony other than the one at Grand Junction, Colorado, on July 14, 1926; that the court in the earlier Salt Lake County case found as a fact that said parties had inter-married by reason of the ceremony performed at Grand Junction, Colorado; that prior to said ceremony which was on July 14, 1926, the District Court for Carbon County, Utah, had made and entered its decree on May 27, 1926, by which this appellant as plaintiff under the name of Elvira Magdaline Fossell was granted an interlocutory decree of divorce from her former husband Stanley C. Fossell and that the copy of decree attached to the complaint was a true copy of that Carbon County decree. Defendant further admitted that plaintiff had regularly paid the alimony decreed by the earlier

Salt Lake County case; that plaintiff had deeded the Centerfield property to her and that he had afterward made some improvements thereon and that the court had decreed to her, said house, equipment, furnishings and supplies. She denied the remaining allegations in said complaint.

By amendment to her answer, defendant alleged as an affirmative and additional defense to said complaint that some time after the year 1920, she left the state of Nevada where she had been living with Stanley C. Fossell, then her husband; that by agreement with him, she went to Price, Utah, with their only child, Roderick Fossell and during about a year thereafter she heard from Mr. Fossell. Thereafter, she heard nothing more from him and was informed by a mutual friend that Mr. Fossell had died; that she had heard nothing from him when the

Carbon County District Court on May 27, 1926, made and entered its decree of divorce in her favor and against Stanley C. Fossell; that the divorce had been obtained on advice of counsel and of the Judge presiding in said court, Judge Christensen, to clarify her marital status; that at the time of said divorce she believed Mr. Fossell was dead and that since the communication from Mr. Fossell after they had agreed that she leave him in Nevada and go to Price, Utah, and until filing the amendment to said answer in September, 1950, she had heard nothing that would cause her to believe that he was alive. Based thereon she alleged that said Stanley C. Fossell died on or about the year 1920.

On the issues thus joined, the case came on for trial on September 29, 1950. The court requested a statement from appellant, then defendant, what she

intended to offer as proof. That offer of proof, by mistake called "Plaintiff's Offer of Proof," (tr. 24-31) is as follows: (tr. 26)

"THE COURT: Mr. Faux may make a statement into the record, of what he intends to prove, and what issues he raises.

"MR. FAUX: At this time, the defendant will prove that about 1920, she and Stanley C. Fossell, as husband and wife, resided in Elko, Nevada. That at about that time they reached some sort of an agreement that Mrs. Anderson, who was then Mrs. Fossell, was to go to Price, Utah, with their baby son Roderick Fossell, and that Mr. Fossell was to follow later.

"That after reaching Price, Utah, where the then Mrs. Fossell resided with her sister, she heard from Mr. Fossell; and it is believed that she will testify that she communicated by mail with Mr. Fossell. That after that communication she heard nothing more from Mr. Fossell.

"That she communicated with a person in Utah who had known the Fossells in Elko, Nevada, and she inquired of him regarding Mr. Fossell, and was informed by him that Mr. Fossell had died.

"That thereafter, in 1926, on advice of counsel, and at the suggestion of Judge Christensen, who was then Judge of the District Court at Carbon County, Utah, she had an action for divorce filed in the District Court at Price, Utah, and the decree of divorce was dated May 15, 1926, and filed May 27, 1926.

"That the reason for this divorce proceeding was to remove any doubt as to her marital status.

"That thereafter, at the suggestion of the plaintiff in this action, H. B. Anderson, she went to Grand Junction, Colorado. That he proposed the trip to Colorado, and paid the expenses for the trip to Colorado, for the purpose of being married, and they were married, or went through a marriage ceremony on July 14, 1926, at Grand Junction, Colorado.

"That thereafter they lived in Utah, as husband and wife, and there were two children born, the issue of that marriage.

"That at the time of the divorce and the time of the marriage in Grand Junction, Colorado, the defendant believed that Stanley C. Fossell her former husband, was dead.

"She will also testify that she and the plaintiff in this action, Mr. H. E. Anderson, talked about that fact, and that Mr. Anderson knew that she believed that her husband was dead. That her husband Stanley C. Fossell was dead.

"Defendant will further testify that to this day she has heard nothing directly from Mr. Stanley C. Fossell, nor has she heard anything about or regarding him, that would lead her to believe or give her any cause to believe that he is living at this time."

Then respondent made his offer as follows: (tr.28)

"THE COURT: You have heard what his client will testify to. Is there anything going to be contraverted?

"MR. REID: Yes, the plaintiff himself will testify he never heard of this matter of this man being dead; that it was never brought to his attention until after this action was filed.

"THE COURT: Anything else you want to put in there?

"MR. REID: And he will also testify that the defendant here went to Price from Salt Lake City, and her husband was to follow from Salt Lake City instead of from Elko, Nevada."

Thereupon the Court made its Findings of Fact, Conclusions of Law, and Order and Decree. Contained in the Findings pertinent to this appellant's claim that the Court erred is the following:

Finding Of Fact

"—the Court does not find and cannot presume from the statement of facts and pleadings that Stanley C. Fossell was deceased on July 14, 1926."

STATEMENT OF POINTS

1. The trial court erred in finding from the evidence as follows:

"—the court does not find and cannot presume from the statements of fact and pleadings that Stanley C. Fossell was deceased on July 14, 1926."

2. The trial court erred in reaching the legal

"---the purported marriage between plaintiff and defendant at Grand Junction, Colorado, on July 14, 1926, was null and void ab initio; ---the defendant had a husband, Stanley C. Fossell, at said time;---the relation of husband and wife never at any time existed between plaintiff and defendant."

"---the decree of divorce and award of alimony in said case #82,262 in this court should be vacated and modified and made a decree of annulment, without alimony, the provision for the support of the minor child of plaintiff and defendant to stand;---there was no proper or any basis for the award of alimony therein."

"---the motion of plaintiff for judgment be granted."

3. The trial court erred in its order and decree:

"IT IS ORDERED, ADJUDGED AND DECREED:
that the decree of divorce and award of alimony in favor of defendant herein in case #82,262 in this court on February 18, 1948, be and here-by is vacated and modified, and that in lieu thereof the purported marriage between plaintiff and defendant at Grand Junction, Colorado, on July 14, 1926, be and is annulled and the award of alimony in said decree set aside,---"

ARGUMENT

In view of the law of this state there appears little need for extended argument. Appellant places her entire reliance upon the case of, *In re Pilchers Estate*, and *Pilcher vs. Pilcher*, Utah, 197 P. 2nd, 143. Why it was not controlling so as to dispense with the need for this appeal is a question about which the trial court and appellant could not see eye to eye.

As in the *Pilcher* case, respondent here contends that the second marriage is invalid. The appellant, after about twenty-four years, was required to defend her marriage to respondent which apparently had bound them in lawful wedlock from July 14, 1926 during which time two children were born as the issue of that marriage. Respondent started the divorce action in Salt Lake County

(case no. 82,262) and took no appeal when the court, in reliance upon their status as man and wife, granted this appellant alimony. The trial court with this case before it, by its finding "the court does not find and cannot presume from the statement of fact and the pleadings that Stanley C. Fossell was deceased on July 14, 1926," and its conclusions and decree hereinbefore set out, erred in requiring this appellant to assume and sustain the burden of proving that on the day of the marriage, July 14, 1926, her former husband, Stanley C. Fossell, was dead. The trial court erred further in ignoring the presumption of validity given her marriage with respondent and in failing to require respondent to assume and sustain the

burden of rebutting "by evidence which negatives the effective operation of every possible means by which a dissolution of such prior marriage could have been effected", *Holman v. Holman*, 1926, Tex. Com. App., 248 S.W. 413.

This appellant when she married respondent thought she was a widow. In looking back on the status of the parties after about a quarter of a century as the trial court in this case did, he was required to recognize a presumption in her favor that she was then a widow or that her former husband, prior thereto, had divorced her, and so conclude that the second marriage was valid. The law regards that presumption almost as an irrebutable presumption, "—it is one of the strongest disputable presumptions known in law."

Smith v. Smith, 1912, 109 Or. 650 131 P. 2nd 447.

Respondent offered nothing as proof to sustain that burden.

Appellant agrees that the Carbon County decree had not become final when the parties went through the marriage ceremony in Grand Junction, Colorado. Accordingly if Stanley C. Fossell had been before the trial court to testify that he had never divorced appellant then there might be some justification in the trial court's decision. The presumptions of his death or divorce by him in the interim, then would have effectively rebutted. As the record appears, when the parties married at Grand Junction, Colorado, on July 14, 1926, appellant was a widow either by reason of the death of her former husband or by reason of divorce from him. The court was required by the Filcher case to presume that fact and to give validity to the

marriage which respondent attacked but as to the invalidity of which he offered no proof. To hold otherwise flaunts the solemn declaration of the court in the Pilcher case as set forth in 197 Pacific Reports at page 153 that:

"The reason for the presumption in the present case is to further a result judicially deemed socially desirable. In other words, it is judicially deemed socially desirable that where a marriage ceremony consummated by cohabitation is shown, an innocent person shall not be branded as having lived in unlawful cohabitation or innocent children be branded as illegitimate, even though if the truth were proved, such would be the case. To avoid such hardships on innocent persons the courts have erected a barrier against such results by creating a presumption in favor of a lawful marriage, which presumption is not overcome by satisfying the ordinary burden of persuasion. Such a presumption persists until it is overcome by clear, convincing and conclusive evidence."

CONCLUSION

Appellant submits that the foregoing justifies the court in reversing the decision of the trial court and in making new conclusions and a decree consonant with the law as expressed in the Pilcher case and in providing for payment by respondent of appellant's attorney's fees and costs through the trial court and this appeal.

RENEILL C. FAUX
Attorney for Appellant.